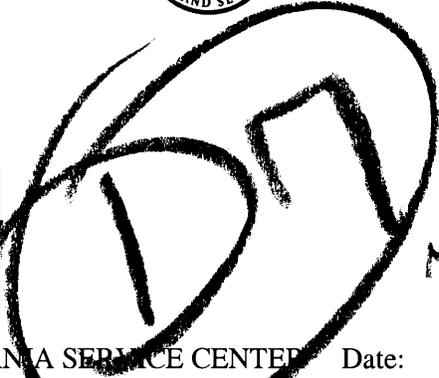


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U.S. Citizenship
and Immigration
Services



MAY 20 2005



File: WAC 03 225 56096 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a California sole proprietorship established by the beneficiary in 1992 which claims to be engaged in international agricultural trade. The petitioner claims that it is the affiliate of Motomco Mundi Comercial Ltda., located in Curitiba, Brazil. The petitioner seeks to employ the beneficiary as its president for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director has misstated the facts submitted by the petitioner and misconstrues the nature of the petitioner's business. Counsel further asserts that the beneficiary will supervise a professional employee and various independent contractors, and that the beneficiary will perform primarily managerial and executive duties. Counsel submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a July 15, 2003 letter appended to the initial petition, the petitioner described the purpose of the transfer and the beneficiary's job duties as follows:

The beneficiary has been the Chief Executive Officer of [the petitioner] since he started the company in 1992 and [the foreign company] located in Curitiba, Brazil . . . since April of 2000. He has been engaged in this work over the past 11 years by traveling back and forth between Brazil and the United States as a visitor for business.

However, because of the continuing growth of the export of fruits and vegetables between the United States and Brazil and Japan, [the beneficiary] has determined that his current business objectives require him to spend more time in the United States to oversee the [petitioner].

* * *

[H]is job will be to manage all aspects of the trading company ensuring that the Company's trade between the United States, Brazil and Japan continues to be vital and productive.

The petitioner also submitted two different resumes for the beneficiary. One version of the resume indicates that the beneficiary has been employed as founder and owner of the U.S. entity from 1992 to 2003. This resume does not list the Brazilian company, or any other company, as his employer during any part of this eleven-year period. The other resume submitted indicates that the beneficiary served as owner and manager of the petitioner, the foreign entity and a third company from 1992 to 1999 and does not list his current employment. The petitioner indicated on Form I-129 that it had three employees at the time of filing.

On August 8, 2003, the director requested, in part, additional evidence to establish that the beneficiary would be employed in a managerial or executive capacity with the United States entity. Specifically, the director requested: (1) a copy of the U.S. company's organization chart including the names and job titles of all employees who will be under the beneficiary's supervision, including a brief description of their job duties, educational level, annual salaries/wages, immigration status and source of remuneration; (2) a more detailed description of the beneficiary's duties in the U.S., including the percentage of time spent in each of the listed duties; (3) copies of the petitioner's California Employment Development Department (EDD) Forms DE-6 Quarterly Wage Report, for the last four quarters; and (5) copies of the U.S. company's payroll summary, Forms W-2 and Form W-3 evidencing wages paid to employees.

In response, the petitioner submitted a letter dated September 29, 2003, which includes the following description of the beneficiary's duties:

[The beneficiary] is engaged in international trading of agricultural products. The duties of [the beneficiary] are to organize trade between the U.S., Japan, and Brazil. [The beneficiary] is licensed with the U.S. Department of Agriculture as a broker as well as a dealer under the Product Dealer's Act in the State of California.

* * *

[The beneficiary] is in the business of buying and selling produce, and his job is that of a broker or dealer.

In lieu of the requested organizational chart, the petitioner provided the following description of the U.S. company's staffing:

[The beneficiary] is the owner of [the petitioning organization] and supervises all activities of the company. His income is set out in the income tax return provided in the I-129 application, showing a gross profit in 2002 of \$184,204. [The beneficiary] is the chief executive officer. He supervises Luciano Sitolini, who is the general manager [redacted] is a U.S. citizen with a bachelor's degree in Mechanical Engineering and earns a salary of \$30,000 a year. [The beneficiary] also supervises [redacted] of the purchasing and marketing office in Japan. The sources of payment for the individuals named above are from the gross earnings of the U.S. business as set out in the Schedule C for 2002. [The beneficiary] also supervises [the foreign entity] in Brazil

The petitioner also submitted its recent payroll statements, one Form 941, Employer's Quarterly Federal Tax Return for the second quarter of 2003, and one Form DE-6 for the second quarter of 2003. The records confirm that the petitioner employed Mr. Sitolini at a monthly salary of \$1,500.

On October 10, 2003, the director issued a second request for evidence, and again asked the petitioner to provide a detailed organizational chart, a detailed description of the beneficiary's duties, including the percentage of time he would spend on each duty, and its Form DE-6, Quarterly Wage Report for the third quarter of 2003. In response, the petitioner submitted a letter dated October 20, 2003, which included the following description of the beneficiary's duties:

As Owner and CEO, [the beneficiary] is responsible for overseeing and developing existing and new foreign trade relationships (60% of his time). On a daily basis, [the beneficiary] develops new contacts with sellers and buyers of agricultural products around the world. For example, [the beneficiary] may find a company in Brazil looking to purchase fruits from outside Brazil. [The beneficiary] will search the globe to find the best supplier to meet the buyer's need. . . .In this way, [the beneficiary] develops international contacts between buyers and sellers of agricultural products, machines, and other products and the Company grows.

[The beneficiary] is also responsible for "closing" the deal (20% of his time). For example [the beneficiary] will bring buyers from Brazil and escort them to meet with suppliers in the United States. There may be several such meetings for each transaction; the larger the transaction, the more such meetings there will be.

Once [the beneficiary] has finalized the deal, his subordinates will arrange all the details. This function of [the petitioning company] is performed mostly by [redacted] who is based in the United States. [The beneficiary] supervises and directs [redacted] performance of this function (20% of the time). [The beneficiary] also supervises and directs [redacted] the manager of the Company's Purchasing & Marketing Office, who is based in Nagano, Japan, whose duties are similar to [redacted]

The petitioner further explained that [REDACTED] as general manager, is responsible for “the logistical arrangements which actually execute the trade; that is, arranging the actual transportation of the goods from the exporting country to the importing country.” The petitioner noted that the general manager contacts transport companies, determines the best price, schedules pick-up and delivery of goods, arranges the payment details with the buyer and seller, and executes all paperwork associated with the trade deals, including documentation required by the governments of the importing and exporting countries involved in each transaction. The petitioner also submitted the requested organizational chart depicting the beneficiary’s supervision of [REDACTED] and the manager of the purchasing and marketing office in Japan. The petitioner stated that the Japan-based employee performs the same duties as [REDACTED] and is paid by commission, receiving 15 percent of the gross value of the company’s Japanese trade deals.

On October 30, 2003, the director denied the petition concluding that the beneficiary would not be employed in a managerial or executive capacity in the United States. The director noted that the beneficiary would be a first-line supervisor of a single employee whose duties have not been established as managerial or professional in nature, and that the beneficiary would be performing the day-to-day operations necessary to produce a product or provide services.

On appeal, counsel for the petitioner asserts that the beneficiary’s subordinate, the petitioner’s general manager, can be considered a professional and a supervisor by virtue of his engineering degree and his responsibility for hiring and supervision of independent contractors to execute the completion of the company’s trade deals. Counsel further asserts that the beneficiary’s duties “fit nicely into the definition of ‘executive capacity’” and explains as follows:

By finding sellers for buyers (and vice versa) and helping them negotiate their deals, the beneficiary “primarily directs the management of the organization . . . establishes the goals and policies of the organization” INA § 101(a)(44)(B). In other words, the details arranged by the beneficiary during the first component of Petitioner’s service are themselves the “direction” “goals” and “policies” which the general manager will follow and carry out. Given the nature of Petitioner’s business, how else could Petitioner perform its service of facilitating trade deals? The petitioner’s president (the beneficiary) identifies parties and brings them together to negotiate the terms of each deal. These are the “directions” “goals” and “policies” the general manager carries out in the second component when he makes all the logistical arrangements. Furthermore, the general manager carries out these directions, goals and policies through other people when he hires and supervises contractors to physically move the goods as described above.

Consequently, the beneficiary is not a first line supervisor. He is the president of the petitioning organization, he sets the goals and policies of the organization, and he directs the general manager of the organization, a professional engineer, who carries out the goals and policies through independent contractors he hires and supervises.

Counsel further states that the statute was not intended to limit managers or executives to those who supervise a large number of persons or a large enterprise, and notes that a beneficiary may be a functional manager,

even if he is the sole employee, where outside independent contractors are used or where the business is complex. Counsel cites an unpublished AAO decision in support of this assertion. Counsel also contends that the director did not take into account the petitioner's staffing needs in light of the company's overall purpose and stage of development, noting "given the petitioner's stage of development, it is appropriate that the petitioner not hire additional staff now but wait until after the beneficiary is present in the United States full-time to help ensure the continued growth of the company."

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity in the United States. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In addition, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Although counsel claims on appeal that the beneficiary will be employed in an executive capacity, the petitioner has submitted no evidence to establish that he will primarily perform executive-level duties related to directing the management of the organization or establishing its goals and policies. The petitioner has specifically stated that the beneficiary "is in the business of buying and selling produce, and his job is that of a broker or dealer." The petitioner states that the beneficiary will spend 60 percent of his time helping buyers and sellers locate one another and assisting them with negotiating their trade deals, and an additional 20 percent of his time arranging meetings. Since the beneficiary actually directly researches, locates and negotiates with buyers and sellers, and is personally responsible for generating business/sales, he is performing a task necessary to provide a service or product and these duties will not be considered managerial or executive in nature. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

On appeal, counsel attempts to equate the beneficiary's primary duties as a broker or dealer with executive responsibility for establishing the organization's goals and policies, stating that the beneficiary's subordinate is expected to follow the terms or "policies" of the negotiated deals when making transport, payment and delivery arrangements. This argument is not persuasive. The record contains no additional independent evidence or explanation establishing that the beneficiary will truly work as an executive or manager in the United States, other than in position title. Merely claiming that the beneficiary is a manager or an executive is insufficient to establish eligibility. Counsel's statements on appeal are likewise unsupported by independent evidence, and are inconsistent with the petitioner's statements that the beneficiary is primarily a dealer or broker. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, counsel objects to the director's conclusion that the beneficiary's proposed subordinate, the petitioner's general manager, is not employed in a professional, supervisory or managerial capacity. Counsel submits that the general manager is a professional engineer, that an engineering degree is required for the position of general manager of the petitioner's agricultural trading company, and that the general manager will act in a supervisory capacity with the authority to hire and oversee independent contractors, who in turn perform the day-to-day services of the petitioner. Counsel's argument is not persuasive for three reasons. First, counsel has not submitted sufficient evidence to establish that the general manager has a bachelor's degree or that such a degree is required to make shipping, payment and transport arrangements. Nor has the petitioner submitted documentation evidencing that it regularly utilizes the services of independent contractors or adequately described the services they provide, such that the general manager could be considered a supervisor or manager of such outside employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Second, even if the petitioner had established that the general manager is employed in a professional or managerial capacity, the petitioner claims that the beneficiary will devote only 20 percent of his time to supervising the general manager. In order to qualify as a manager under section 101(a)(44)(A) of the Act, the beneficiary must *primarily* supervise and control the work of other supervisory, professional, or managerial employees, or manage an essential function within the organization, or a department or subdivision of the organization. As discussed above, the petitioner has stated that the beneficiary will spend 80 percent of his time performing the duties of a dealer or broker.

Third, while it appears that the claimed independent contractors would relieve the general manager of some of his duties, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business of brokering deals between buyers and sellers of produce. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Id.*

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity even though he was the sole employee. Counsel has furnished insufficient evidence to establish that the facts of the instant petition are analogous to those in the unpublished matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

On appeal, counsel also suggests that the beneficiary may qualify for the benefit sought as a "functional manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job description that clearly describes the

duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages, rather than performs, an essential function.

Finally, counsel objects to the director's emphasis on the petitioner's lack of employees, and contends that the director did not take into account the petitioner's reasonable staffing needs. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise, which had been successfully doing business for over twelve years, justify the beneficiary's performance of primarily non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190. Counsel states on appeal that additional employees may be hired if the petitioner's business grows upon the beneficiary's arrival in the United States on a full-time basis. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

The fact that an individual owns and manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties will be primarily directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a

day-to-day basis. Nor does the record demonstrate that the beneficiary will primarily manage an essential function of the organization or that he will operate at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that it is a qualifying organization as defined at 8 C.F.R. § 214.2(l)(1)(ii)(G) and as required by 8 C.F.R. § 214.2(l)(3)(i). While the petitioner attempts to establish an affiliate relationship between the United States and foreign entities, as a matter of law, the beneficiary is ineligible for the classification sought. It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. In order to meet the definition of "qualifying organization," there must be a United States employer. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). The petition includes evidence, including an IRS Form 1040 with Schedule C, which demonstrates that the beneficiary is doing business as a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual proprietor. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). As in the present matter, if the petitioner is actually the individual beneficiary doing business as a sole proprietorship, with no authorized branch office of the foreign employer or separate legal entity in the United States, there is no U.S. entity to employ the beneficiary and therefore no qualifying organization. For this additional reason, the petition may not be approved.

Another issue not raised by the director is whether the petitioner has established that the beneficiary was employed in a full-time capacity by the foreign entity for one continuous year during the three years preceding the filing of the instant petition as required by 8 C.F.R. § 214.2(l)(3)(iii). The petitioner has provided only minimal evidence to establish that the beneficiary has a majority ownership in the Brazilian company, and although requested by the director, has provided no evidence that the beneficiary has received any payments from the foreign entity. Although the beneficiary is claimed to be the managing partner, the foreign entity's tax documents identify another partner as the company's manager. While the petitioner states that the beneficiary currently manages both entities and regularly travels between Brazil and the United States on a business visitor visa, it is unclear exactly how much time the beneficiary has actually spent working for the petitioner in the United States during the three years preceding the filing of this petition. The AAO also notes the submission of a resume for the beneficiary which indicates the United States entity as his only employer for the last eleven years, and further notes that the business operates out of a home in California which is owned by the beneficiary and his wife. The petitioner has not shown that the beneficiary has been employed on a full-time basis by the Brazilian entity for one continuous year out of the three years preceding the filing of the instant petition. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.